REAL ESTATE DRAFTING FOR CITY ATTORNEYS

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I. ABOUT THE AUTHOR

After graduating with a degree in Political Science/French from Austin College, Jonathan studied law at SMU Dedman School of Law in Dallas. Jonathan has worked and represented governmental entities all over the state since 2005 but since 2010, Jonathan has been Assistant City Attorney for the City of Bryan, Texas. His areas of expertise include real estate, economic development, dangerous structures, animal law, and of course, other duties as assigned.

Jonathan's real estate experience extends over the better part of two decades of representing school districts, community college districts, cities, transportation code corporations, and others. He has helped closed multi-million dollar land sales and development projects; aided with the acquisition, marketing, and sale of property for economic development; and reviewed and drafted countless deeds, easements, deeds of trust, liens, notes, and other instruments. Jonathan is a frequent speaker at TCAA and also a member of the Animal Law Section and the Real Estate, Probate and Trust Law Section of the State Bar of Texas. He lives in Bryan with his wife and three dogs.

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II. INTRODUCTION

When thinking of real property, we often think mostly of deeds and easements. However, that is just the tip of the iceberg for the kinds of documents city attorneys have to draft. We deal with more different kinds of real property issues than most other governmental entities because we don't just own city hall, we own the road that got us there, and the easements the provide water, sewer, and electricity. We provide affordable housing under federal programs that require us to employ security interests to ensure it is used for a national objective. We mow weeds and grass, abate nuisances, demolish substandard structures, and then need to get a lien on the property that we cleaned up to make sure we get paid back. Cities even control how others obtain real property through the regulation of subdivisions and site plans. The purpose of this paper is to highlight those legal issues that are commonly faced by real estate attorneys but apply them to the many different ways the cities own and encumber realty. Because deeds are the entire bundle of sticks, the paper focuses on the drafting of deeds as a means to discuss instruments that affect real property in general. We then highlight the unique characteristics of other instruments. We will discuss the anatomy of these documents and outline the traps and pitfalls to be avoided when reviewing and drafting them.

III. DRAFTING DEEDS

A. Generally

When discussing the conveyance and ownership of property, we typically mean fee simple, which is the broadest property interest allowed by law.[1] When using the "bundle of sticks" analogy, it means all the sticks. Texas law provides a standard form for a general warranty deed to convey fee simple.[2] While it can be modified, and in some cases must be modified, it provides the basic structure of all deeds: heading, identification of the grantor and grantee, description of the property, consideration (if any), operative conveyance language, warranty (or lack thereof), exceptions (if any), reservations (if any), execution by the grantor, and acknowledgement.

B. Headings

The heading is partly the confidentiality statement[3] and partly the reference to the state of Texas and County where the property is located.[4] The former is a creature of statute and is not necessary in order for the deed to be valid.[5] The latter is not explicitly required by statute, nor is it a requirement either, but since a deed is required to be filed in the county where the property is located it makes it helps to make it clear that the deed is being recorded in the right place. The phrase "know all persons [or men] by these presents" is another common formality but not an explicit requirement. Even the name of the deed is essentially a formality, and while it can be instructive it will not be controlling. For example, just because you call something a warranty deed doesn't mean it is one unless the warranty is included. You can label something a gift deed

[1] Black's Law Dictionary, Second Pocket Edition 2001.
[2] Tex. Prop. Code § 5.022.
[3] *Id* at § 11.008.
[4] *Id* at § 11.001.
[5] *Id* at § 11.008(d). Additionally the clerk has no authority to reject deeds for failure to comply with the requirement. *Id* at (e)

or a parkland deed, or a deed for city hall, but unless there are conditions within the document that enforce that label as a condition, it is not likely to be a determining factor.

C. Grantor/Grantee

Property records are organized as a grantor, grantee index. Electronic records have rendered this distinction somewhat moot, but in the end the same issue applies. Spell names correctly. This can be an issue when dealing with entities with similar sounding names, so be sure make it clear who the grantor and grantee are so that when documents are recorded they are referenced accurately. While typically the city or county of residence of both parties is added, only the grantee's address must be included within the deed or in a separate writing attached to the deed.[6] Tax appraisal districts monitor the property records to keep the tax roll up to date, and unless some other documentation is provided to the appraisal district, the address stated in on the deed will be the address used for tax (and all related) purposes.[7]

D. Consideration

Consideration can be stated, but is not necessary for a deed to be valid.[8] However, in order for the conveyance to take priority over any prior, unrecorded interests, valuably consideration must be exchanged.[9] The most common placeholder is "ten dollars and such other valuable consideration, the receipt and sufficiency of which is hereby acknowledged." But there is some case law that indicates this recital of consideration indicates that the conveyance was a gift rather than a conveyance for consideration.[10] Pursuant to contract law terms, if other language in the deed creates some form of ambiguity, parole evidence may be introduced to show that the money

[6] *Id* at § 11.003
[7] Tex. Tax. Code § 1.07(b).
[8] *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)
[9] Tex. Prop. Code § 13.001
[10] *Bentley v. Andrewartha*, 565 S.W.2d 590, 592 (Tex. App.—Austin 1978, no writ)

was never tendered and the conveyance was not for valuable consideration.[11] Since the ten dollars is historically never exchanged, the argument is not without merit. If the actual consideration paid is stated, that would be a safe way of ensuring that the grantee did in fact pay consideration. Since the amounts paid for land, either to or by the City, is ultimately a piece of information the public has a right to know, there is little harm in being transparent. That is not always going to be the case. Some property owners do not like disclosing how much they paid or were paid, and so while the information may be public, they may not want it in the deed. Similarly, the City may want to keep the price confidential if there is a series of purchases which have not all been consummated at the same time.

E. Operative Language

Some would say the defining characteristic of the deed is the operative language. Specifically, the conveyance language, "grant, sell, and convey". It was once considered the sine qua non of a deed, however it is recognized that this is no longer a necessity.[12] If an instrument purports to convey an interest in property in fee simple the absence of these words will not invalidate the deed.[13] That being said, if it ain't broke, don't fix it, so if you are drafting you may as well use these words and avoid potential for confusion. Objections tend to crop up when a deed is being dedicated or given as a gift, in which case the grantor may object to the word "sell". Alternative language can be used while still maintaining the same format. For example, grant, dedicate, and convey, or words of similar affect.

[11] *Id.*
[12] *Green v. Canon*, 33 S.W.3d 855, 858 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
[13] *Id.*

F. Warranties

For the most part deeds are defined by the kind of warranty being given. There are three kinds of deed in relation to the warranty begin given. General Warranty, Special Warranty, and a Deed Without Warranty or Quitclaim. A general warranty means that the grantor is expressly promising to defend against any title defects in the property.[14] A special warranty means the grantor is expressly promising to defend against only those issues created by the grantor.[15] They are not promising they owned it in the first place, just that they have not sold it to anyone else. A quitclaim, by contrast, is a deed without any warranty and it conveys the grantor's rights in property, if any.[16] A deed without warranty or a quitclaim deed is something that purports to convey the grantor's interest, if any, in a particular parcel, but does so without any guaranty, warranty, or covenant that title is actually being conveyed. They are a valid form of conveyance, but inherently of limited value, given the uncertainty of what interest, if any, is conveyed.[17]

A warranty clause in a deed is not part of the conveyance proper, but is a separate contract on the part of the grantor to pay damages in the event of failure of title.[18] A warranty of title does not warrant the title of the grantor but instead warrants the title of the grantee.[19] A general warranty is indemnity for the purchaser against loss or injury sustained by failure of the grantor's title.[20] A warranty of title is not breached unless and until there has been an actual or constructive eviction of the grantee by an individual with superior title.[21] The mere existence of a superior title in another, which has never been enforced, does not amount to a breach of the covenant of

[14] *Munawar v. Cadle Co.*, 2 W.W.3d 12, 16 (Tex. App.—Corpus Christi 1999, pet. denied).
[15] *Id.*
[16] *Geodyne Energy Income Prod. P'ship I-E . Newton Corp.*, 161 S.W.3d 482, 485 (Tex. 2005).
[17] *Id.*
[18] *Chicago Title Ins. Co. v. Cochran Invs., Inc.*, 602 S.W.3d 895, 902 (Tex. 2020) (*citations omitted*).
[19] *Gibson v. Turner*, 156 Tex. 289, 294 S.W.2d 781, 787 (Tex. 1956).
[20] *Chicago Title Ins. Co.*, at 902.
[21] *Id.*

warranty.[22] This is a contrast to a policy of title insurance, which guarantees title for the policyholder and protects against losses such as last sales due to inadequate title.[23] An owner's title insurance policy insures against losses attributable to defects in title that related to the property insured and are not excepted or excluded from coverage.[24] Title insurance is a contract of indemnity that gives a cause of action to the policyholder against any loss or claim regarding property.[25]

This raises an issue for city attorneys is whether a Texas municipality can lawfully commit to any warranty. The Texas Constitution states, "no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fun of at least two percent thereon".[26] The Texas Attorney General has determined that indemnity agreements create a debt within the meaning of the constitution.[27] A debt is any pecuniary obligation imposed by contract.[28] There is an implied covenant of seisin in any deed except for a quitclaim.[29] The covenant is an assurance that the grantor owns the property they are purporting to sell.[30] The measure of damages is the consideration paid with interest.[31] Because this is a potential pecuniary obligation, it can be argued that no warranty can be granted by a city. Furthermore, cities cannot claim title insurance as a source of funds to satisfy any claim under a warranty because the policy terminates upon sale,[32]

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[22] *Id.*
[23] *Southern Title Guaranty Co. v. Prendergast*, 494 S.W. 154, 156 (Tex. 1973).
[24] *Clements v. Stewart Title Guaranty Co.*, 537 S.W.2d 126, 128 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.)
[25] *Southern Title Guaranty Co.*, at 156.
[26] Tex. Const. Art IX, § 5.
[27] Tex. Att'y Gen Op. No. GA-0176 (2004) (citing *Tex. & New Orleans R.R. Co. v. Galveston County*, 169 S.W.2d 713, 715 (Tex. 1943).
[28] See *City-County Solid Waste Control Bd. V. Capital City Leasing, Inc.*, 813 S.W.2d. 705, 707 (Tex. App.—Austin 1991, writ denied).
[29] *Chicago Title Ins. Co., supra* at 901.
[30] *Id.*
[31] *Id.*
[32] *See* Form T-1 Owner's Policy of Title Insurance Texas Department of Insurance. Title Insurance Basic Manual.

G. Legal Descriptions

Any conveyance that affects real property must include a legal description of that property to be binding. A legal description is one that provides the means or data by which the particular land to be conveyed may be identified with specific certainty.[33] A specific description of property will control over a conflicting general description.[34] Therefore, if a deed is for "that 40 acre tract more particularly described as [*metes and bounds description that comes out to only thirty acres*]" it only conveys the thirty. The cardinal rule of surveying is follow the footsteps of the original surveyor when attempting to locate the true lines of a survey.[35] If they cannot be followed, then use the surrounding facts and circumstances to arrive at the purpose and intent of the original surveyor.[36] Preference is given to the calls of the original grant.[37] When considering calls to follow, there is an order of preference 1) natural objects, 2) artificial objects, 3) course, and 4) distance.[38] However, the general rule gives way to specific circumstances and if the original marks and calls have disappeared over time, the lines and corners may be established using the best evidence available.[39] So while the original survey should be followed when possible, if a later survey can provide a more specific description, or if it can be shown that the original surveyor's calls were incorrect, that preference may not apply.[40] The important thing is that the legal description be accurate and reflect what is actually on the ground. Visual verification is essentially, and an accurate survey cannot be created in an office.

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[33] *Jones v. Kelly*, 614 S.W.2d 95, 99 (Tex. 1981).
[34] *Stribling v Millican DPC Partners, LP*, 458 S.W.3d 17, 20 (Tex. 2015).
[35] *Carrollton v. Duncan*, 742 S.W.2d 70, 71 (Tex. App.—Fort Worth 1987, no writ).
[36] *Id*.
[37] *Id*.
[38] *Id.*
[39] *TH Invs., Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 205 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).
[40] *Carroll Indep. Sch. Dist. v. Nw. Indep. Sch. Dist.*, No. 02-18-00264-CV, 2021 Tex. App. LEXIS 5255, at *77 (Tex. App.—Fort Worth July 1, 2021, pet. denied)

Lot and block references are far easier to verify. Subdivision plats are a matter of public record and for the most part you can look at a page and see the property in question. But take care that visual inspection is still a necessity. Just because the chain of title shows a clear record owner does not mean they are in fact occupying the property they claim. Just because the facts line up on paper does not mean they line up on the ground.

H. Exceptions and Reservations

Exceptions to a deed are those items found in the title commitment that are matters of record excluded from the coverage and excluded from the deed and attending warranty. Exceptions commonly include easements, mineral leases, reservations of mineral rights, or restrictive covenants. While for the most part these are fait accompli, depending on the intended use of the property and the nature of the encumbrance, part of the due diligence process will be resolving any potential title issues. Any easements not released or surface waiver not obtained prior to conveyance of the property will mean the property is accepted subject to those matters of record.

Reservations in a deed are encumbrances created by the deed. Often times they are conditions. For example, Blackacre is dedicated to the City of Pawnee for so long as it is used as a public park. The conveyance is a fee simple subject to a condition subsequent, i.e. a condition that if met, transfers title or creates the possibility of a transfer. Because courts abhor a forfeiture, conditions are construed narrowly such that unless a deed expressly states otherwise, grantors will have to exercise a right of reentry before a fee owner's interest is extinguished.[41] There are other limitations as well, such as the Rule Against Perpetuities, however the rule has been limited by

[41] *Lawyers Trust Co. v. Houston*, 359 S.W.2d 887, 890 (Tex. 1962).

state law to allow courts to interpret conveyances in the manner that attempts to satisfy the will of the grantor while still complying with the rule.[42]

Cities will often include reservations as well. Donations of land to charities are permissible provided that there are provisions that require the land to be used for a public purpose and revert back to the city if that purpose is not being met.[43] In such cases cities should include express provisions that provide no reentry is necessary.[44] In the course of economic development, cities want to ensure that property sold for a specific purpose are used for such purpose. There are options such as contract liens (i.e. deed of trust), right of first refusal, or a reversion in the event a condition is not met (e.g. construction of movie theater within 24 months). Each of these options carry with it variables that will impact the appropriateness. For example, in the case of a raw land deal, where the developer is financing the construction of some new facility, a reverter would likely kill any chance of getting financing, even if the city agreed to subrogate. A deed of trust would be more acceptable, assuming the city agreed to subrogate, but then the city's security is junior to a large lien the city may not be willing or able to pay off. Deed restrictions are an option, but at best, they give the city a cause of action for breach, but no actual ownership or control over the property.

I. Execution

Typically, the grantor is the only required signatory, beside the notary.[45] Many cities also require the attestation by the city secretary and approval as to form by the city attorney if the

[42] Tex. Prop. Code § 5.043.
[43] Tex. Loc. Gov't Code § 253.011.
[44] *Lawyers Trust Co.*, at 890.
[45] Tex. Prop. Code § 12.001. The statute provides for an alternative, two credible witnesses, but notaries are so easy to have on staff, it is easier to have things notarized since that is what most people (including county clerks) are expecting.

document is executed by the city.[46] The attestation of a city secretary is an alternative form of acknowledgement that is technically sufficient for recording.[47] Additionally, the Property Code also permits a deed to be filed if witnessed by two credible witnesses.[48] Ultimately, it is so easy to have a notary on staff, it is much easier to just have document notarized as that is what county clerks and title companies expect.

While signature by the grantee is not a requirement for a deed, it may be advisable. If cities have a process for documenting acceptance of real property, adding a signature requirement provides prima facie proof that the process was followed. When plats are recorded, they bear not only the owner's signature, but the city engineer, planning and zoning official, and/or others so that there is documentation that the process to accept the dedications in the plat were followed. While cities have less control over deeds, a requirement that acceptance be documented will aid in showing that the city did, or more importantly did not accept:

- that road your client does not want to maintain;
- that park your client does not want to build;
- unusable floodplain property the developer wants off the tax roll; or
- a superfund site donated to the city for tax purposes and to add another set of deep pockets into the chain of title.

Adding an acceptance requirement for deeds (and easements for that matter) helps differentiate properties lawfully accepted by the city. To be fair, it will not be definitive because any property owned prior to implementation of the policy would not bear the signature and so investigation would still need to be done in those cases. Nevertheless, it could reduce the burden and in more ways than one. If the acknowledgment of acceptance also indicates for what purpose and by what department. This can have a material impact if, for example, the city wants to prove that property

[46] Attestation by the city secretary is typically a requirement of home rule charters or for general law cities, by statute. Tex. Loc. Gov't Code § 22.073(b)
[47] Tex. Gov't Code § 602.002(16)
[48] Tex. Prop. Code § 12.001.

was not owned, held, or claimed for park purposes,[49] or if the city is selling property that is owned by a municipally owned utility.[50]

Another instance where there could be multiple signatures is in correction deeds. Correction instruments have been in use for some time but have relatively recently been given statutory authorization.[51] There are two types of correction instrument: material and non-material.[52] A non-material correction deed can be filed to correct typos, defects in form, or a minor error/omission from the legal description.[53] This need not be executed by the original grantor, but could be executed by anyone with knowledge of the facts so long as the basis for such knowledge is disclosed in the instrument.[54] If not signed by the original grantor and grantee, then in addition to being recorded it must also be sent to each.[55] A material correction instrument is one that adds additional property or interest or otherwise modifies rights that were (at least facially) conveyed by the original instrument.[56] This must be signed by both the original grantor and grantee, or their heirs, successors, or assigns.[57]

IV. CREATING EASEMENTS

In many respects, the structure of an easement matches that of the deed. They have the same heading.[58] They must be in writing.[59] They must be recorded.[60] Therefore, a lot of the prior

[49] *See* Tex. Loc. Gov't Code § 253.001(b); Tex. Parks and Wildlife Code Ch. 26. These statutes impose requirement before park or recreational land can be sold or put to other uses.
[50] Tex. Loc. Gov't Code 272.001(k).
[51] Tex. Prop. Code § 5.031 Correction deeds filed prior to the effective date of this chapter are effective to the same extent as long as they substantially comply with the statute.
[52] *Id* at § 5.028-.029
[53] *Id* at § 5.028
[54] *Mannen v. Trout*, No. 12-20-00125-CV, 2021 Tex. App. LEXIS 6150, at *5 (Tex. App.—Tyler July 30, 2021, pet. denied); Tex. Prop. Code § 5.028(c)..
[55] *Id* at § 5.028(d).
[56] *Id* at § 5.029.
[57] *Id* at (b).
[58] *Id* at § 11.008.
[59] *Id* at § 5.021.
[60] *Id* at § 13.001.

advice for drafting deeds will continue to hold true. However, there are key differences that set them apart from deeds, and so we will address how those differences should be reflected in the documents you prepare for your clients.

A. Legal Description

For the most part, the legal descriptions used in easements must follow the same rules as deeds. The principle difference is that the easement itself does not necessarily need to be defined. For example, a blanket easement that defines the servient estate but not the easement itself.[61] By contrast some easements contain multiple descriptions. For example, an appurtenant easement encumbers the servient tract for the benefit of the dominant estate and thus both tracts must be defined.[62] In some cases, defining the burdened tract and the benefitting tract will be sufficient. But that will not always be the case, because even if both tracts are known, the easement itself must be clear.[63] In the Pick case, there were two properties sold within five days of each other, one clearly was sold subject to an easement and the other clearly was sold benefitting from an easement, but there was no single document linking the two.[64] The Court found that there was insufficient evidence to demonstrate that the easement from the one deed was the easement referenced in the other.[65]

When drafting easements, it is better to be as clear as possible. But sometimes circumstances will prohibit that. Blanket easements are a common tool for utilities that know the general path they will follow but do not know the precise path until closer inspection of the terrain. They can be unlimited, e.g. grantor gives the grantee the right to install utilities on Blackacre, or

[61] *See e.g. First Am. Title Inc. Co. v. Willard*, 949 S.W.2d 342, 344-45 (Tex. App.—Tyler 1997, writ denied).
[62] *See Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1962).
[63] *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983).
[64] *Id.*
[65] *Id.*

defined upon installation, e.g. grantee is given a ten foot electrical easement may place an electrical distribution line on Blackacre, located five fee from either side of the distribution line. If an easement permits replacement, or multiple lines, a blanket easement burdens the entire tract even after the initial construction is complete. Some easements provide for a metes and bounds description to be prepared upon completion of construction. Another option is granting a right of entry for the purpose of conducting a survey and subsequently granting an easement over a defined area. Even if an easement is limited to a defined area, be sure the grantee will be able to access it, whether from within the easement or from public rights of way. Even if you limit a grantee's access to within the easement, if the terrain makes it impossible to access the easement without going across the grantor's adjacent property, the right may be inferred.

B. Rights Conveyed

Remember that in the bundle of sticks analogy of property, an easement is the conveyance of just the one stick, i.e. just the rights being listed in the easement. An easement is a non-possessory right to use property for specific purposes, and nothing more.[66] Easements are a limited right to use the property of another, in accordance with the express unambiguous terms.[67] Contract language applies to interpretation of easements and they will be interpreted using only the language within the document unless the term is ambiguous.[68] Ambiguity only exists if there are two reasonable interpretations after the application of established rules of construction.[69] So if the express easement does not provide the authority to do something, it (typically) does not exist.

- Easement for electrical lines did not include cable TV.[70]
- Authority to build an intake pipeline did not include the authority to build a second.[71]

[66] *Lance v. Robinson*, 543 S.W.3d 723, 736 (Tex. 2018).
[67] *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999).
[68] *Id*
[69] *Id.*
[70] *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697 (Tex. 2010)
[71] *Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613 (Tex. 2008)

- Easement permitting the cutting/trimming of trees that endangered electrical lines did not include poisoning stumps and trimming trees that were not a threat.[72]
- An express easement for driveway purposes does not include parking.[73]

Of course, there are exceptions.[74] There is case law that will support certain uses as inherent in public easements, e.g. an easement for city streets includes the right for the city to lay sewer, water, and electric utilities.[75] The city also has the power to grant private utilities to locate within city streets as well.[76] And there are statutes as well. In an unincorporated area, a cable TV provider has broad authority to be located within any public road, alley, or utility easement.[77]

When drafting an easement, take care and accurately describe the client's needs and intended uses. When possible, provide your client with as much flexibility as possible. Also be aware that this applies as much to reservations of rights as it does to the conveyance. Grantors like to retain any and all rights to use the property but will agree to "not unreasonably interfere". Better to be specific about what they intend to use the property for and set limits. Do they want to build a building on top of your client's 36" sewer main? Are they going to grant pipelines, cable companies, and other utilities access to the same space as your client's facilities? Limits on reservations should be as specific as grants of authority.

C. Other issues

There are some additional nuggets of wisdom generally applicable to easement drafting. For utilities in particular, or any other easement in gross[78], strive for consistency. For the most part, our clients use default forms giving them the same rights of access for all easements. Your

[72] *Murphy v. Fannin Cty. Elec. Coop.*, 957 S.W.2d 900, 903-907 (Tex. App.—Texarkana 1997, no pet.).
[73] *McNally v. Guevarra*, 989 S.W.2d 380, 383 (Tex. App.—Austin 1999, no pet.)
[74] Please read this in the most sarcastic voice possible.
[75] *Hill Farm, Inc. v. Hill* County, 436 S.W.2d 320, 321 (Tex. 1969); *West Texas Util. Co. v. City of Baird*, 286 S.W.2d 185, 188 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.)
[76] *Baird supra*, 286 S.W.2d at 188
[77] Tex. Util. Code § 181.102.
[78] Meaning easements that are dedicated for the benefit of a specific user as opposed to a specific parcel.

client may not remember that even though they have an unfettered right of access to 98% of their easements, on this 100' stretch they need to get the owner's permission in writing forty-eight hours in advance. Nevertheless, understand that your client will not always have the bargaining position to dictate those terms. Easements will almost never be "exclusive" as the grantor wants to retain certain rights. Therefore give your client limited authority to exclude, for example if you don't want other infrastructure interfering, have the Grantor covenant not to install, or permit others to install, any utilities within X feet of your client's facilities. Easements are hypothetically permanent, but they can be terminated and/or limited to a specific term.[79] Litigation regarding abandonment of easements is voluminous and yet largely inapplicable. Our clients are custodians of land dedicated to the public, as well as the operators of utility systems, and so we have some fairly broad authority to determine what constitutes continued use. Lastly, make good use of negative space. Parole evidence is only admissible if there is an ambiguity so the fact that something was removed from the easement is not necessarily admissible evidence. Look at how the entire document reads after the change.

V. DRAFTING OTHER INSTRUEMENTS

A. Plats

Without getting into the expansive issues associated with platting in general, this section will address plats as a conveyance. Per state law, municipalities can accept donations of property via plat.[80] However, title to the dedication is only as strong as the developer claim to title.[81] Title

[79] For example easements granted by the Texas A&M University System are limited to ten years in duration and must be renewed. Tex. Educ. Code § 85.26. I just learned this does not apply to other state university systems, so this is basically just my problem. Coming from the heart of Aggieland, I am bitter and the rest of y'all suck.
[80] Tex. Loc. Gov't Code § 212.048 provides that acceptance of the plat does not count as acceptance of the property until actual appropriation by the governing body by formal use, acceptance, or improvement.
[81] *See City of Hedwig Vill. Planning & Zoning Comm'n v. Howeth Invs.*, 73 S.W.3d 389, 393 (Tex. App.—Houston [1st Dist] 2002, no pet.) (noting that you have to be the owner of the property to execute the plat); *see also Lacy v. Hoff*, 633 S.W.2d 605, 610-11 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (citing requirements from the predecessor statute for owners to provide a metes and mounds description of the land to be subdivided).

insurance should be required to ensure that the signatory does in fact have title. Additionally, ensure the metes and bounds description is certified by the engineer or surveyor preparing the plat. Because plats frequently include the dedication of public property, streets, utility easements, parks, etc. most cities include language in their ordinance that facilitates such dedication. Typically, it is a simple dedication of those elements shown on the plat for the ascribed uses. Those dedications will be considered easements as they typically are identified for a specific purpose set forth in the plat and do not include any of the formalities of conveyance of fee simple, but theoretically they could. Most plats are extremely short on detail when it comes to the easements being dedicated, for drainage easements, access easements, or public utility easements can mean different things depending the customary practice in that city. Most importantly ensure your clients are aware of the importance of labels on plats because, often as not, the entire breadth and scope of information available to describe your client's interest in a particular easement is just a few characters e.g. "10' P.U.E." or "5' EE".

B. Preparing Liens and Deeds of trust

Like easements, these instruments will bear a resemblance to deeds, e.g. heading, notarized, legal description, etc.[82], and yet have characteristics that are specific to them. For the most part, the language specific to liens is governed by statute.[83] Deeds of trust have some guidelines in terms of notices, waivers, and the time, place, and manner of foreclosure.[84] However contract liens, i.e. deeds of trust, are contracts and thus more customizable. When using deeds of trust to provide security for a given client, consider not only the interest of the client but also the rights of the grantor/debtor. Avoiding usury seems a non-issue for our clients, but if the note

[82] Tex. Prop. Code §§ 12.001, 11.008
[83] Tex. Prop. Code Chapter 51; Tex. Health and S. Code § 342.007; Tex. Loc. Gov't Code 214.001.
[84] Tex. Prop. Code § 51.002.

charges interest and allows for acceleration, be sure to have a clause that restricts payments to non-usurious levels. Due on sale clauses, i.e. the condition that the note is breached and the deed of trust may be enforced if the property is sold, are generally enforceable but in some cases limited by federal law. Specifically, a lender with a deed of trust on residential property with less than five dwelling units may not exercise the due on sale clause in any of the following circumstances:

- A subordinate lien
- Purchase money security interest for appliances
- Transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety
- Lease (less than three years) without an option to buy
- Transfer to a relative on death of borrower
- Transfer where spouse or children of borrower become an owner
- Transfer resulting from divorce/separation (decree or agreement)
- Transfer to inter vivos trust where borrower is beneficiary
- Any other transfer described in regulations prescribed by the Federal Home Loan Bank Board.[85]

As a general rule, security interests have priority in the order they are recorded.[86] An exception is that municipal nuisance liens have priority over all other liens except for tax liens.[87] When a superior lien is foreclosed, a junior lien is extinguished unless there are sufficient proceeds to pay junior lienholders.[88] It is not relevant that the junior liens were not included in the lawsuit and judgment, if they had notice they are extinguished.[89] However, like any other interest, a lien or deed of trust is void as to a bona fide purchaser for value with a recorded deed.[90] If the property is sold and a deed is recorded before a nuisance lien or other interest can be recorded, it will not

[85] 12 U.S.C. § 1701j (d).
[86] *AMC Mortgage Services, Inc. v. Watts*, 260 S.W.23d 582, 585 (Tex. App.—Dallas 2008, no pet.)
[87] Tex. Loc. Gov't Code § 214.001(o), Tex. Health & S. Code § 342.007(d).
[88] *See Saturn Capital Corp. v. City of Houston*, 246 S.W.3d 242, 245 (Tex. App.—Houston [14th Dist] 2007, pet. denied).
[89] *Id.* It was previously thought that municipal liens would survive a tax foreclosure sale, but since the city's taxes are necessarily included within tax suits, the city has notice of the suit and no basis to argue its junior liens survive foreclosure.
[90] Tex. Prop. Code § 13.001(a).

affect the property.[91] This is primarily an issue with nuisances, where the owner is aware of the city's actions and gets rid of the property in a fire sale. As a practice tip, liens should be recorded as soon as costs are incurred by the city and can be documented. There is no due process requirement that the owner be given an opportunity to pay the invoice first. Delay only furthers the risk that the property will be sold. Additionally, when preparing liens consider processes proportionate to the value being secured. For example, a mowing lien for $300 can be part of a system that relies on forms and appraisal district legal descriptions. But a lien for $30,000 should probably undergo more scrutiny. This does not have to be expensive, for example, it could be done using the county property records. A simple search for sales by the listed record owner may show if the property has changed hands recently. And if the legal description is questionable, a more accurate legal descriptions might be located by searching prior deeds and then referencing the volume and page of a deed with a better description.

C. Writing licenses and leases

Licenses and leases are interests in property, but they are contractual agreements that are not typically recorded. Because they are not a conveyance, like a deed or easement, they are by nature temporary and/or revocable. Because they are creatures of contract, for the most part they are customizable. Licenses are generally distinguishable from leases because they are a right to utilize property for a particular purpose, and so like an easement as compared to a deed, a lease typically entails more authority and freedom to control. Leases are typically an exclusive right to a specific property or structure. The Property Code does provide some generally applicable provisions for leases, as well as provisions specific to residential and commercial leases.[92] The

[91] *Id.*
[92] *Id* at Chapters 91, 92, and 93.

provisions applicable to residential leases, for the most part, cannot be waived by agreement.[93] That is not the case with commercial tenancies, where for the most part a lease can supersede state law.[94] The one notable exception is that a lessor of property being used for prostitution can expedite the process of eviction despite lease terms.[95] Because these agreements are not a conveyance of the property, but rather are contractual agreements to allow the use of property, they may not require the same authority to execute that a deed or an easement requires.

Ground leases are a different animal in part because they are intended to provide long term rights, like a conveyance, and they are intended to be binding on future owners.[96] So unlike other leases, it is important to record a notice of the existence of a ground lease in the property records so that future owners cannot take the property free and clear of the lease. Lessors may be required to execute SNDAs, a subordination non-disturbance and attornment agreement. Generally, a valid foreclosure of a lien terminates any leases entered into subject to that lien.[97] The SNDA is an agreement that includes the tenant and the landlord's lender. A tenant's rights can be protected through the signing of a subordination, non-disturbance, and attornment agreement with the landlord's lender.[98] An SNDA a tenant agrees to subordinate its rights to the lender while the lender agrees not to terminate a lease upon foreclosure unless the lease is in default.[99] By definition, a subordination agreement merely alters the priority of different parties' liens.[100] In

[93] *See e.g. id* at § 92.006, § 92.015(b)(1)
[94] *Id* at § 93.002(h).
[95] *Id* at e § 93.013.
[96] There are entire papers dedicated to the nuances of ground leases and I will only touch on the surface because this paper is too long already.
[97] *Kimzey Wash, LLC v. LG Auto Laundry, LP*, 418 S.W.3d 291, 294 (Tex. App.—Dallas 2013, pet. dism'd).
[98] *W. Loop Hosp., LLC v. Hous. Galleria Lodging Assocs., LLC*, No. 01-19-00885-CV, 2022 Tex. App. LEXIS 1465, at *13 n.2 (Tex. App.—Houston [1st Dist.] Mar. 3, 2022) *citing HMC Hotel Props. II Ltd. P'ship v. Keystone-Tex. Prop. Holding Corp.*, No. 04-10-00620-CV, 2011 Tex. App. LEXIS 9258, 2011 WL 5869608, at *12 n.4 (Tex. App.—San Antonio Nov. 23, 2011) (mem. op.), *rev'd on other grounds*, 439 S.W.3d 910 (Tex. 2014).
[99] *Id.*
[100] *Western Auto Supply Co. v. Brazosport Bank*, 840 S.W.2d 157, 159 (Tex. App.—Houston [1st Dist.] 1992, no writ).

an attornment agreement, the lessee agrees to abide by the lease, even though the original lessor may cease to hold rights in the property.[101] Non-disturbance agreement means that the lease will continue despite landlord's breach and the lenders foreclosure. On the flip side, a tenant's lender may require an SNDA with the landlord, so that the lease because security for the lender's loan and in the event of a breach by the tenant, the lender can foreclose on the lease. Ground leases must be limited to a duration of years that makes it less than permanent.[102]

D. Reviewing real estate purchase/sales contracts

The preparation of the real estate contract can be fairly easy, as there are forms produced by the Texas Real Estate Commission ("TREC") that are relatively easy to come by. One drawback, the forms are copyright protected, so only a licensed broker or realtor is authorized to use the software that enables the forms to be customized. They have different forms for residential, commercial, or unimproved land as well as various addenda so you can customize with the elements you need. Whether you are working from scratch or just filling in the blanks, there are still a lot of things you will need to think about. One thing to bear in mind is that this is a contract and for the most part, all terms are negotiable.

A standard purchase agreement involves a number of variables, but they all entail the same basic concept. It is a promise to sell (i.e. execute a deed) and a promise to pay. In most cases, there is a feasibility or due diligence period, which is the time period during which the buyer can inspect the property/title and decide to back out. It is also a basic requirement that there be a

[101] *City of Galveston v. Saint-Paul*, 2008 Tex. App. LEXIS 1074, 2008 WL 384145, at *1 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (mem. op.).
[102] *See Walker v. City of Georgetown*, 86 S.W.3d 249 (Tex. App.—Austin 2002, no pet.) (holding that a ten year lease of parkland was not a sale; *but see River Rd. Neighborhood Assoc. v. South Texas Sports*, 720 S.W.2d 551, 560 (Tex. App.—San Antonio, writ dism'd) (holding that a fifty year lease was an unconstitutional delegation of authority over public property).

deadline to close on the sale. There can be a number of other deadlines that may or may not be applicable:

- Title review: x days for commitment, x days for buyer to review and raise objections, x days for seller to agree to cure or not, and x days for buyer to waive or terminate;
- Survey: x days to obtain one, and a similar set of options for objections and the option to cure
- Phase I Environmental: this is about CERCLA environmental liability, in short you get protection if the Phase I shows no issues;
- Other conditions like financing, sale of other property, or getting authorization.

A lot of these variables depend on whether the property is improved and/or whether it is being sold "as is". It is entirely common for contract price to be negotiated and subsequently renegotiated as inspections reveal issues with the property and/or title. In addition to the price, the amount of earnest money can be negotiable. So can the independent consideration, i.e. the amount of money that goes to the seller if the buyer elects to terminate.

The first thing to consider is who has signatory authority and how is it obtained. Ideally, a contract should be binding on the other party before the terms of the deal are made public. The Public Information Act and the Public Meetings Act both include provisions that permit information to be kept confidential for a time, but eventually the sale will be public.[103] In a city manager form of government, you can easily have the city manager execute a contract that is binding on both parties, but still subject to city council authority. In the case of purchases, that means you need to get authorization within the feasibility period (ideally) or at least prior to closing. In the case of sales, the authority to sell the property must be expressly subject to the council, and you should determine whether failure to obtain council authority is a breach, i.e. if property fails to close due to lack of authority, does the buyer get their earnest money back.

[103] Tex. Gov't Code 551.072; Tex. Gov't Code 552.105.

Additionally what are the buyer's remedies, i.e. not specific performance. In general law cities without a city manager, you may simply negotiate terms in executive session up to the point where there is a contract ready to be signed. Have the other party execute prior to the meeting so that the agreement can be executed by the mayor immediately after the terms are made public.

Another commonly negotiable term are the closing costs. Typically, the seller bears the brunt of the closing costs, including title insurance premium, recording fees, broker's fees. Escrow costs and attorney's fees are often split. However this is completely negotiable.